

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' MOTION FOR PRETRIAL RULING ON ADMISSIBILITY
OF TESTIMONY ABOUT DEFENDANT JON PAUL SMITH'S
FALSE STATEMENTS TO THE FBI**

I. Introduction

At trial, the United States will seek to admit testimony detailing the false statements that Defendant Jon Paul Smith made to the FBI when he was interviewed about the bid rigging charged in this case. Defendants Martin and B&H Maintenance & Construction, Inc., have indicated that they object even to the mention of these statements in the Indictment. (Defendant B&H's Mot. to Strike Prej. Srplsg. From the Indtmnt. (Docket # 46) Ex. A at ¶16; Landon Martin's Mot. for Lv. to Join Mots. Filed by Co-Def. B&H Maint. & Constr. (Docket # 49) ¶5). Therefore, the United States anticipates that the Defendants will also object to testimony about

the false statements and seeks a pretrial ruling that this testimony is admissible. Because the false statements are “intrinsic” to the crimes charged in Count Two and because they are evidence of Smith’s motive and intent for Count Two and knowledge of guilt and absence of mistake with respect to Count One, they should be admitted. In addition, the statements are admissible against Defendant Martin because, as explained below, they show his knowledge and intent to participate in a bid rigging scheme.

II. Facts

In Count One of the Indictment, the Defendants are charged with conspiring to rig bids submitted to BP America Production Company. In Count Two, Defendant Smith is charged with obstructing the investigation into the activities that led to the charges in Count One by tampering with a witness.

The story of the obstruction begins when the FBI interviewed Defendant Landon Martin at his home. At the close of the interview, the agent asked Defendant Martin where he could find Smith, and Defendant Martin gave him contact information for Smith. After the interview with Martin, the FBI agent went immediately to Defendant Smith’s house to interview him. However, when he arrived, Defendant Martin was already at Smith’s house. The FBI agent interviewed Smith at his house, with Defendant Martin present for the entire interview. At the interview, Defendant Smith falsely denied exchanging price information with Kenneth Rains and falsely indicated that he did not know Rains well. In the face of Smith’s false statements, Defendant Martin remained silent. At the close of the interview, the FBI served Defendant

Smith with a grand jury subpoena.¹

Shortly after the government investigators left his house, Defendant Smith telephoned Kenneth Rains to coordinate their stories so that Rains would tell the same lies to the FBI and grand jury. Defendant Smith described to Rains the false statements that he had made to the FBI and indicated that the government would never be able to prove the conspiracy. Both Smith and Rains knew that Smith's story was false, and Rains understood that Smith was attempting to persuade him to tell the same lies.

III. Argument

A. Smith's False Statements to the FBI are Admissible Against Smith With Respect to Count Two Because They Are "Intrinsic" to the Witness Tampering Charge.

Under Federal Rule of Evidence 404(b), evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of the defendant. Fed. R. Evid. 404(b). However, "[r]ule 404(b) only applies to evidence of acts *extrinsic to the charged crime*." *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993) (emphasis added) (quoting *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992)); accord *United States v. Johnson*, 42 F.3d 1312, 1316 (10th Cir. 1994) (citing *United States v. Orr*, 864 F.2d 1505, 1510 (10th Cir. 1988)). Evidence of uncharged bad acts that are "intrinsic" to the charged crime are admissible unless the probative value is "substantially outweighed by the danger of unfair prejudice." *Lambert*, 995 F.2d at 1007-08 (quoting Fed. R. Evid. 403).

Uncharged conduct is "intrinsic" to the charged crime "when the evidence of the other

¹Martin also received a grand jury subpoena at the end of his own interview.

act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.” *Lambert*, 995 F.3d at 1007 (citations omitted). Uncharged conduct is “inextricably intertwined” with charged conduct if “a witness’ testimony would have been confusing and incomplete without the mention of the prior act.” *Johnson*, 42 F.3d at 1316 (citations and internal quotation omitted).

Here, Defendant Smith’s false statements to the FBI are intrinsic to the witness tampering charge both because they were part of a “single criminal episode” and because Kenneth Rains’s testimony would be “confusing and incomplete” without being able to mention the false statements to the FBI. First, the false statements were part of the same “criminal episode” as the witness tampering because both the witness tampering and the false statements shared the same purpose – to cover up Defendant Smith’s antitrust violations – and because the witness tampering occurred shortly after the false statements (Smith called his boss after speaking to the FBI and then called Rains). Therefore, the false statements are “intrinsic” to charged conduct, and testimony about the statements should be admitted.²

Second, Smith’s false statements are “intrinsic” to charged conduct because Kenneth Rains’s testimony would be “confusing and incomplete” without mention of the false statements. *See Johnson*, 42 F.3d at 1316. To support the witness tampering charge, the United States will call Kenneth Rains, who will describe the telephone conversation in which Smith attempted to

²The United States will call the FBI agent to whom Smith made the false statements. In addition, as described below, coconspirator Kenneth Rains will recount Smith’s subsequent description of the false statements.

persuade Rains to lie. In that conversation, although Smith did not explicitly tell Rains to lie, he subtly attempted to steer Rains into complicity in the coverup. He told Rains what false information he had provided to the FBI, and stated that the FBI would not be able to prove when Rains learned Smith's bid numbers, implicitly asking Rains to lie as well. Quite simply, the jury cannot understand the meaning of Smith's subtle conduct unless Rains fully explains their conversation. And to explain their conversation, he must refer to Smith's description of his false statements to the FBI. Therefore, the false statements to the FBI are "inextricably intertwined" with the witness tampering and are admissible as bad acts "intrinsic" to the witness tampering.

B. Defendant Smith's False Statements Are Admissible to Show Motive and Intent for Count Two and Knowledge of Guilt and Absence of Mistake for Count One.

Even if the statements were extrinsic to Count Two and admissibility were governed by Federal Rule of Evidence 404(b), the false statements to the FBI would be admissible to show Smith's motive for attempting to convince Rains to lie: a jury could infer that Smith's motives for attempting to cause Rains to lie were to prevent Smith's own lies to the FBI from being discovered and to prevent the underlying antitrust conspiracy from being discovered. They are also admissible to show Smith's knowledge of his own guilt with respect to the bid rigging charged in Count One.³ *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982) ("False exculpatory statements made by a defendant are admissible to prove circumstantially consciousness of guilt or unlawful intent.").

³Of course, any evidence admissible against Smith with respect to Count One is also admissible against B&H because Smith, as Vice President of B&H acting within the scope of his employment, was an agent of B&H. *See* Fed. R. Evid. 801(d)(2)(D).

C. Defendant Smith's False Statements Are Admissible Against Martin to Show Knowledge and Intent.

Finally, Smith's false statements are admissible against Defendant Martin with respect to Count One. The false statements are admissible as non-hearsay evidence because they are not offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Moreover, they are relevant evidence against Martin because they show knowledge and intent to participate in the bid rigging scheme. Specifically, Defendant Martin was present at the FBI interview where Smith denied ever exchanging bid numbers with Kenneth Rains. Defendant Martin knew that this statement was untrue because Martin had given Rains B&H's bid numbers at Smith's direction. Yet in the face of Smith's blatant falsehood, Martin remained silent. A reasonable jury could infer that Martin would not have remained silent unless he were aware of and involved in the scheme. Therefore, the statements are admissible against Martin.

IV. Conclusion

For all these reasons, the Court should rule that testimony relating to Smith's false statements to the FBI is admissible against Defendant Smith as to both counts of the Indictment and against all three Defendants with respect to Count One.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I electronically filed the foregoing United States' Motion for Pretrial Ruling on Admissibility of Testimony About Defendant Jon Paul Smith's False Statements to the FBI with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane Lotko-Baker

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